90-351

No._____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1990

STEVEN P. GERBER,
Cross-Petitioner,

vs.

V-1 OIL COMPANY,
Cross-Respondent.

CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

CROSS-RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Is Wyo. Stat. § 35-11-109(a) (vi) which permits warrantless administrative searches by environmental inspectors, constitutional under the Fourth Amendment?

2. Was V-1 Oil Company's expectation of privacy adequate to support an action pursuant to 42 U.S.C. § 1983?

3. Is Steven P. Gerber entitled to good faith qualified immunity from suit under 42 U.S.C. § 1983, on the ground that he did not violate a clearly established right of V-1 Oil Company?

LIST OF PARTIES

Steven P. Gerber brings this matter before the United States Supreme Court on a Cross-Petition for Writ of Certiorari.

V-1 Oil Company, a Wyoming corporation, is named in this matter as the Cross-Respondent.**

** Subsidiaries of the Cross-Respondent are:

V-1 Oil Company, a Utah corporation
V-1 Oil Company, a Wyoming corporation
V-1 Gas Company, a Wyoming corporation
V-1 Gas Company, an Idaho corporation
V-1 Petroleum Company
V-1 Propane Company
V-1 Self-Serve Company, Inc.
Weathertite Block Company

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BRIEF IN OPPOSITION TO STEVEN P. GERBER'S CROSS-PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cross-Respondent, V-1 Oil Company, respectfully requests that the Cross-Petition for Writ of Certiorari of Cross-Petitioner Steven P. Gerber be denied.

OPINIONS BELOW

On September 28, 1988, the U.S. District Court for the District of Wyoming issued its decision in this matter,

which has been recorded at 696 F.Supp. 578 (D. Wyo. 1988). V-1 Oil Company appealed the decision of the District Court to the Tenth Circuit Court of Appeals. The opinion of the Court of Appeals is reported at 902 F^2 1482 (10th Cir. 1990). A copy of the Tenth Circuit's opinion is attached to V-1 Oil Company's Petition for Writ of Certiorari, as Appendix A. A copy of the opinion of the U.S. District Court is attached to V-1 Oil Company's Petition for Writ of Certiorari, as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on April 30, 1990. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This suit was brought initially pursuant to 42 U.S.C. § 1983.

The Cross-Respondent, V-1 Oil Company, filed a Petition for Writ of Certiorari in this matter on July 23, 1990. The Cross-Petitioner received that petition on July 23, 1990. The Cross-Petition was submitted pursuant to Rule 12.3 of the Rules of the Supreme Court of the United States, and was received by the Cross-Respondent on August 23, 1990.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statutes are involved:

Constitution of the United States
Amendment IV

Security from Unwarrantable Search and Seizure

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Constitution of the United States
Amendment V

Rights of Accused in Criminal Proceedings

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Constitution of the United States
Amendment XIV, Section 1

Citizenship Rights Not To Be Abridged by States

All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the

United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

§ 35-11-109, W.S. 1977, Amended 1988

Powers and duties of director.

(a) In addition to any other powers and duties imposed by law, the director of the department shall:

(vi) Designate authorized officers, employees or representatives of the department to enter and inspect any property, premise or place, except private residences, on or at which an air, water or land pollution source is located or is being constructed or installed, or any premises

in which any records required to be maintained by a surface coal mining permittee are located. Persons so designated may inspect and copy any records during normal office hours, and inspect any monitoring equipment or method of operation required to be maintained pursuant to this act at any reasonable time (upon reasonable notice) upon presentation of appropriate credentials, and without delay, for the purpose of investigating actual or potential sources of air, water or land pollution and for determining compliance or noncompliance with this act, and any rules, regulations, standards, permits or orders promulgated hereunder. For surface coal mining operations, right of entry to or inspection of any operation, premises, records or equipment shall not require advance notice. The owner, occupant or operator shall receive a duplicate copy of all reports made as a result of such inspections within thirty (30) days. The department shall reimburse any operator for the reasonable costs incurred in producing copies of the records requested by the department under this section;

STATEMENT OF THE CASE

MATERIAL FACTS

Petitioner V-1 Oil Company owns and operates a self-service gasoline station in Lander, Wyoming. It sells retail gasoline and liquified petroleum gas to retail customers.

On April 28, 1988, the dirt and concrete had been removed from the top of the gasoline storage tanks pre-

paratory for a pressure test for leaks. Respondent Steven Gerber is an engineer with the Department of Environmental Quality, Water Quality Division (DEQ). On April 28, 1988, Mr. Gerber drove by the station and saw concrete being broken out. He thought some storage tanks were being removed and wanted to inspect the work. He could not see the tanks without being on the property. (Gerber Deposition, pp. 16, 17, 27). On that morning while excavation was first in progress, Mr. Gerber came to the excavation site and was asked to leave by the station manager for V-1. The area had been roped off from the general public with barrels, piping and flags. (Evans' Deposition, pp. 15, 24-25; Wood Affidavit, Document No. 15). Mr. Gerber returned about 1:30 p.m. and again was asked to leave the premises by Mr. Leonard Wood, V-1's area manager. Rick Evans, the station manager, on the same day, told the day worker, Steve Drake, who came on duty at approximately 3:00 p.m., that if any DEQ people came to inspect, they were to be told to stay in the station until he, Rick Evans, could get there. During the day, Gerber had contacted Steve Jones, Assistant Attorney General for Wyoming, who advised him that § 35-11-109(a) (vi) permitted warrantless searches. (Gerber Affidavit, Jones' Affidavit, in support of Motion for Summary Judgment).

Mr. Gerber again returned to the station at 8:20 p.m., when all management people were gone, for the purpose of gathering evidence of a possible DEQ violation. (Gerber Deposition, pp. 16-21). He was accompanied by two people, one of whom was a policeman. He showed the attendant a business card and identified himself. He was told by the station employee he was to stay in the station until Rick Evans, the manager, arrived. Nevertheless, Gerber, claiming he had the authority to inspect "under state law" (Drake Deposition, pp. 7, 11, 13, 22), then proceeded to the excavation site, took a sample of dirt, which he handed to the policeman who had accompanied him, who then left

with the sample. When a demand for the return of the sample was made by Mr. Evans, Mr. Gerber stated he did not have the sample. He later retrieved the sample from the policeman. (Gerber Affidavit, Ex. 5).

On Motion for Summary Judgment, the Honorable Alan R. Johnson, Judge, granted the State's Motion for Summary Judgment, finding that § 35-11-109(a) (vi) allowed warrantless searches; that the search was reasonable; that there was no clearly established law prohibiting Gerber's actions.

On appeal, the Tenth Circuit Court of Appeals, reversing in part, found that the subject statute authorized warrantless searches, but that the statute did not provide a constitutionally adequate substitute for a warrant; that the law was clearly established and that Gerber's warrantless search violated petitioner's Fourth Amendment rights.

Mr. Gerber has filed a Cross-Petition for Writ of Certiorari seeking a reversal of the Tenth Circuit Court's decision and holding that the statute did not provide a constitutionally adequate substitute for a warrant.

REASONS FOR DENYING THE WRIT

The Wyoming statute is limited in scope and narrow in application to inquiries of the Wyoming Environmental Council. There was a reasonable expectation of privacy protected by the Fourth Amendment; qualified immunity is based upon an objective test, rather than the subjective test of good faith.

I. THAT THE WYOMING ENVIRONMENTAL QUALITY INSPECTION STATUTE IS UNCONSTITUTIONAL HAS NO NATIONAL IMPACT.

Cross-Petitioner Gerber seeks a reversal of the Tenth Circuit Court's ruling that the subject statute is unconstitutional, not on the ground that it complies with constitutional requirements, but because several federal statutes granting the power of warrantless searches may be called into question and it would be to the advantage of government to circumvent the constitutional protection of the warrant requirements of the Fourth Amendment.

Neither of these arguments are of national importance or establish the necessary constitutional protection required of warrantless searches. The constitutionality of warrantless searches must be made on a case by case basis. *See v. City of Seattle,* 387 U.S. 541, 546, 87 S.Ct. 1737, 1741, 18 L.Ed.^{2} 943 (1967).

The government's need (or desire) to make discretionary inspections, randomly and without constraint, should not be permitted to overwhelm the citizen's right to a prior judicial inquiry and approval before an administrative inspection occurs. Whether or not the Tenth Circuit decision would form a basis for challenging other warrantless search statutes is purely speculative. *Marshall v. Barlow's, Inc.,* 436 U.S. 305, 322, 98 S.Ct. 1816, 1825.

Discretionary federal administrative search statutes have been stricken as unconstitutional. *Marshall v. Barlow's, Inc., id,* 436 U.S. 307; *Marshall v. Horn Seed Company, Inc.,* 647 F^2 96 (10th Cir. 1981); (Occupational Safety and Health Act of 1970, § 8 (f) (1), 29 U.S.C.A. § 657 (f) (1), cf. *Robberson Steel Co. v. Occupational Safety and*

Health Review Commission, 645 F^{2} 22 (10th Cir. 1980).

Wyoming Inspection Statute Does Not Meet the Requirements of *New York v. Burger*

As in *Donovan v. Dewey*, 452 U.S. 593, 101 S.Ct. 2534, the statute at bar

> "is without standards to guide inspectors either in their selection of establishments to be searched or in the exercise of their authority to search . . . instead, simply provide that such searches must be performed 'at . . .reasonable times, and within reasonable limits and in a reasonable manner . . .' ", and "devolves almost unbridled discretion upon executive and administrative offices, particularly those in the field, as to whom to search and when to search." *Donovan v. Dewey*, 452 U.S. at 601, 101 S.Ct. at 2636.

It is of singular importance that the Wyoming investigative statute only permits designated persons to

> ". . . inspect any monitoring equipment or method of operation required to be maintained pursuant to this Act at any reasonable time (upon reasonable notice) . . .' § 35-11-109(a) (vi).

There is no showing that V-1 had any monitoring equipment nor any method of operation required to be maintained by the Act. Indeed, this is not what Gerber was inspecting. The statute has no application for random inspections of potentially leaking underground storage tanks.

In any event, the Wyoming inspection statute does not provide a constitutionally adequate substitute for a warrant, in that it applies to every business in Wyoming; does not advise an owner that his property will be subject to periodic inspection; does not provide assurance of regularity; does not limit the discretion of the inspectors, in that it does not clearly define what is to be searched, who can be searched, and the frequency of such searches. *New York v. Burger,* 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.^{2} 601 (1987); *Marshall v. Barlow's, Inc., supra,* 436 U.S. at 323; *Donovan v. Dewey, supra,* 452 U.S. at 599.

II. V-1'S EXPECTATION OF PRIVACY WAS ESTABLISHED AND GUARANTEED BY THE FOURTH AMENDMENT AND THE WARRANTLESS SEARCH WAS NOT REASONABLE.

Mr. Gerber could not see the excavation site without being on the property. The area was roped off from the general public and marked with barrels, piping and flags. Three times on that day he was refused access. Since the excavation site was protected from public intrusion, and as Mr. Gerber could not see the site or extract a soil sample without entering the enclosed area, neither the plain view nor open field doctrine applies. *Marshall v. Barlow's, Inc., supra,* at 315, 98 S.Ct. at 1822; *United States v. Rucinski,* 658 F^2 741, 745 (10th Cir. 1981); *Air Pollution Variance Board of the State of Colorado v. Western Alfalfa Corporation,* 416 U.S. 861, 40 L.Ed.^{2} 607, 94 S.Ct. 2114. Excepting the public from an excavation area is both reasonable and necessary. Even though accessible to the public, it is constitutionally protected. *Katz v. United States,* 389 U.S. 347, 361.

Michigan Department of State Police v. Sitz, _____ U.S. _____, 110 S.Ct. 2481, 110 L.Ed.[2] 412 (1990) is cited by the State as authority for the requirement of a balancing test of the expectation of privacy against the public need for warrantless inspections. *Sitz* involved a sobriety checkpoint program for evidence of intoxicated drivers. The investigation was applied uniformly to all drivers encountering the roadblock, and averaged a 25-second delay per person.

This is a substantially different application for denying the right of privacy than a non-consensual inspection of the land of a single proprietor for the sole purpose of attempting to determine whether or not an environmental violation had occurred, and is no authority for carte blanche inspections, randomly selected, for unknown but suspected environmental violations. Random, infrequent or unpredictable warrantless inspections where the owner has no real expectation that his property will be from time to time inspected by government officials are constitutionally objectionable. *Donovan v. Dewey, supra,* 452 U.S. at 598, 101 S.Ct. at 2538.

That the State of Wyoming did not intend to grant warrantless inspection authority was demonstrated by the lack of authority to the Wyoming Environmental Quality Council to issue administrative warrants.

In any event, administrative inspection warrants are available on a lesser showing of cause than criminal warrants, and impose no serious burden on the inspection system or the courts. *Marshall v. Barlow's Inc., supra,* 436 U.S. 305, 315, 98 S.Ct. 1816, 1822; *Marshall v. Horn Seed Co., Inc., supra,* 647 F.2 96 (10th Cir. 1981).

The State argues that it tried to get a warrant on the inspection date. It is more than apparent that the excava-

tion was open at 8:20 p.m.. when the inspection did occur, and would still be open the following day. The plain truth is that the State simply bulled its way past V-1's employee, and now seeks justification for the conduct of its officials.

III. THERE IS NO CONFLICT BETWEEN CIRCUIT COURT DECISIONS ON THE QUESTION OF QUALIFIED IMMUNITY.

Blair v. Freeman, 483 U.S. 1014 (8th Cir. 1987) reversed and remanded *Freeman v. Blair,* 793 F^2 166 (8th Cir. 1986) in light of the Court's earlier decision in *Anderson v. Creighton,* 483 U.S. 635, 97 L.Ed.^{2} 523, 107 S.Ct. 3034. *Anderson* required that the actions of the inspector be evaluated under the standard of "objective legal reasonableness" and the legal rules that were "clearly established" at that time. *Freeman v. Blair,* 862 F^2 1330, 1331 (8th Cir. 1988).

The subject South Dakota statute was specifically directed at the campground industry and required periodic inspections for compliance with . . . rules and regulations of the department. *Freeman v. Blair, ibid,* 793 F^2 166, 175 (8th Cir. 1986).

The South Dakota statute provided at least a minimal requirement of periodic inspection of a pervasively regulated industry. *New York v. Burger, supra,* 482 U.S. 691, 107 S.Ct. 2636, 96 L.Ed.^{2} 601 (1987).

The Eighth Circuit found that the commercial campground business was pervasively regulated, but that any defects in the regulatory scheme set forth in the statute were not sufficiently obvious to make the defendant's reliance on the scheme objectively unreasonable. *Freeman v. Blair, ibid,* 862 F^2 at 1331.

This is not the factual situation in the case at bar. The Wyoming statute does not target the retail gasoline industry, which is not pervasively regulated under the Wyoming Environmental Quality statutes; the statute does not provide for periodic inspections. There is no basis for an objectively reasonable inspector to not know that the statute was unconstitutional in view of V-1's clearly established right to be free of warrantless searches.

Accordingly, there is no conflict between the Circuit court decisions on this question.

CONCLUSION

For the foregoing reasons, the Cross-Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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